The Solicitors' Journal

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CURRENT TOPICS

Remuneration: A Step Forward

WITH the publication in the August issue of the *Law Society's Gazette* of the full minutes of the Annual General Meeting of members held on the 6th July, we are enabled to record, albeit rather belatedly, the gratifying facts that the Lord Chancellor has agreed to convene the Statutory Committee under s. 56 of the Solicitors Act, 1932, and that the Council of The Law Society are now engaged in preparing a draft remuneration order for submission to that committee. Composed as it is of the Lord Chancellor, the Lord Chief Justice, the Master of the Rolls, the President of The Law Society, the President of a Provincial Law Society (who will on this occasion be Mr. J. W. T. HOLLAND, President of the Liverpool Law Society, as announced elsewhere in this issue) and—where appropriate—the Chief Land Registrar, the committee is one the majority of which, as the President observed, have never practised as solicitors. Whatever may be thought as to the long-term appropriateness of such a tribunal for fixing professional remuneration, it is at present the only existing machinery for regulating scales of costs, and viewed in the light of events in the last year or two the Council are to be congratulated on a very considerable achievement in securing agreement to its being convened. If an order is made by the committee one further hurdle will remain: it must be laid before Parliament and is subject to a negative resolution of either House. But as a valid order requires the Lord Chancellor as one of its signatories, it would presumably carry Government acquiescence (to put it no higher) and there does not seem great reason to fear Parliamentary rejection. Much will therefore depend on the profession's two representatives on the committee, and they will carry with them to their task the confidence and united goodwill of solicitors everywhere.

The Law and the Festival

UNDER this heading we referred in these columns nearly a year ago to the place of the law in the South Bank Exhibition, which was then, of course, at an embryonic stage. Readers who have not had an opportunity of visiting this territory of tired but happy feet, its myriad units animate and animated now fully deployed, may like to know how the event compares with the promise. In place of its provisional title, "Character and Tradition," the pavilion where English law figures is now called "The Lion and the Unicorn." No one can say that the chief exhibit of legal interest has not been given prominence. It stands high, a slender red-robed column surmounted by wigs, and revealing beneath its robes a veritable bellyful of Law Reports. At the foot is a set bound in red leather of the Hailsham edition of Halsbury. Framed on one side we see a musty parchment which is presumably intended to reinforce the reference to Magna Carta painted round the base of the exhibit: the other façade is devoted to the mysteries of habeas corpus, by virtue of which (the bystander is informed) a man cannot be imprisoned without trial. All this must be suitably impressive to the lay mind. We could only wish that some hint had been vouchsafed of the lively concern of the law with ordinary everyday affairs. We are certainly not inclined to ask for sensational captions, such as that in the

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Dome of Discovery, "The squid is really jet-propelled," but it would be an improvement, we think, if the specimen writ of *habeas corpus ad subjeciendum* which is on view were a real one, with real names and a seal, instead of a soulless form with stereotyped explanations filled into the blanks. Surely somebody could have been found willing to lend an original.

Solicitor Acting for Vendor and Purchaser

SOLICITORS are warned in a note in the *Law Society's Gazette* for August that any reduction from the full scale charges by a solicitor acting for both vendor and purchaser might be regarded as a breach of r. 2 of the Solicitors' Practice Rules, 1936. It is stated that if a solicitor properly discharges his duty towards both vendor and purchaser he will have performed substantially all the work contemplated by the Solicitors' Remuneration Orders and will therefore be entitled to charge the full deducing and investigating scale fees. Reference is made to Opinion 572 in the 1937 edition of the "Law Society's Digest" and it is pointed out that to charge only "scale and a half," divided equally between the two parties, as was sometimes done in some areas, may well render a solicitor liable to disciplinary proceedings.

Guardianship and Maintenance of Infants Act, 1951

PRACTITIONERS in magistrates' courts should note this Act, which came into force on 1st August, 1951. It will be remembered that the High Court decided in *R.* v. *Sandbach Justices; ex parte Smith* [1951] 1 K.B. 62; 94 SOL. J. 597, that applications to a magistrates' court under the Guardianship of Infants Acts, 1886 and 1925, should only be made in the place where the respondent resided. The Act now extends the jurisdiction of both county courts and magistrates' courts in such applications by enabling them to be made in the places where the applicant or the infant resides as well as where the respondent resides. Also, as doubts had been felt whether guardianship orders made prior to the *Sandbach* case by magistrates' courts for the area where the applicant or infant resided were good, the new Act sets these doubts at rest by validating all orders already made and still in existence. The Act also increases the amount awardable by magistrates' courts under the Guardianship of Infants Acts to 30s. per week for each child and enables existing orders to be increased to this new amount.

Legal Aid

THE *Law Society's Gazette* for August contains a number of interesting items relating to legal aid. A minor expense to be incurred in future by the Legal Aid Fund is that resulting from the decision of the Home Secretary, after consultation with the Lord Chancellor's Department, that the practice of waiving the expenses of Metropolitan police witnesses required to give evidence at the instance of persons granted legal aid under the Act should be discontinued. With regard to counsel's fees the Council request that where on taxation there is an appreciable reduction of counsel's fees as set out on the fee note, solicitors should notify counsel as soon as possible (and in any event before the allocatur is issued) in order that counsel may, if he desires, make representations. Applications to instruct a second counsel, the Council state, must set out the grounds relied on in support of the application and should be made in sufficient time to enable the area committee to give the application proper and detailed consideration, and solicitors may be required to lodge papers relating to the action. Solicitors' attention is also directed to the fact that, where an assisted person abandons a claim, counter-claim, petition, cross-petition or defence for which a certificate has been granted, immediate application to discharge the certificate or amend it to cover outstanding issues should be made to the area committee. The Council hold that it may be an abuse of the legal aid procedure for an assisted person to appear as such after the object of the certificate has been abandoned.

The Sale of New Cars

IN our issue of 9th December, 1950, we recorded the introduction of a new covenant scheme by the British Motor Trade Association and pointed out that, with a view to ensuring that the Association should be entitled to damages as against a purchaser who disposed of his car in breach of covenant, purchasers were required to covenant to give the Association a right of pre-emption, or to nominate a purchaser, in the event of their wishing to sell the car before the expiry of the two-year covenant period. We said that the intended measure of damages was the difference between the price which the covenantor would have obtained if he had complied with the terms of his covenant (i.e., had sold the car to the Association at the price which he himself had paid, viz., list price), and the price which such a car would fetch if sold in breach of covenant. It is clear that such a measure of damages simply ensures that no profit enures from a breach of covenant. Whether or not this was a correct estimate of the damage flowing from a breach was considered on 24th July by DANCKWERTS, J., in *British Motor Trade Association* v. *Gilbert* (*The Times*, 25th July). The list price was £1,263 3s. 11d. and evidence was given that the "black market" value was £2,100. The difference of £836 16s. 1d. was claimed by the Association as damages. His lordship said it was strange that the Association should claim a figure based on the assumption that the scheme sponsored by them was being surreptitiously evaded, and that recovery of damages based on a figure higher than the list price would seem to be doing the very thing which the Association had steadily set their face against. However, having regard to s. 51 of the Sale of Goods Act, 1893, and to cases which had been cited by counsel (*Rodocanachi, Sons and Co.* v. *Milburn* (1887), 18 Q.B.D. 67; *Williams Brothers* v. *Ed. T. Agius, Ltd.* [1914] A.C. 510; *Brading* v. *F. McNeill & Co., Ltd.* [1946] Ch. 145), he was satisfied that that was the measure of damages which must be awarded.

The "Hundred-Yard Move"

UNDER the headlines "Homes to Move Every 6 Weeks" and "Caravans Avoid Prosecution," the *Daily Telegraph* for 31st July reports that in future the owners of nineteen caravans will move their caravans round and round a Surrey beauty spot—Gatton Park, Merstham—in order to enable the owner of the park to avoid prosecution under s. 269 of the Public Health Act, 1936. This is an example of the "100-yard move" which has made local authorities so reluctant to rely upon that section. A licence must be held by a person who allows his land to be used by "moveable dwellings," except that it can be so used without licence for forty-two consecutive days in each calendar year. The section provides that "A person shall not keep a moveable dwelling on any one site, or on two or more sites in succession, if any one of those sites is within one hundred yards of another of them, on more than forty-two consecutive days or sixty days in any twelve consecutive months, unless . . . he holds a licence . . . from the local authority of the district." The owner was given a temporary licence from January to June, to which were attached conditions regarding sanitation and road making which, he said, would cost £500, without there being any guarantee of a renewal. The owner was fined the modest sum of £33 for not complying with the conditions and not removing the caravans on expiry of his licence.

LIABILITY FOR THE MAKING-UP AND REPAIR OF HIGHWAYS

THE responsibility for the making-up of roads, especially those in suburban and semi-rural areas, is a matter which is now exercising the minds of a considerable number of owner-occupiers. Some frontagers bought their houses at high prices since the war and now find themselves faced with serious expense in respect of the roads. On a large number of estates houses were completed and occupied just before the war and the purchasers paid a sum of money in respect of the making-up of the roads to the satisfaction of the local authority. In many cases the roads were not made up owing to the war and the estate developer has gone into liquidation for the same reason, with the result that the roads now have to be made up at greatly increased cost, and residents often look to their local authority to take this burden from their shoulders. It will therefore be useful to review the legal position of the local authorities.

This branch of the law is one of great antiquity and even greater complexity. The fundamental rule is that at common law, with exceptions set forth below, the liability to repair a highway falls upon the inhabitants at large of the parish wherein it is situated. "By common law or common right the inhabitants of the parish at large are bound to repair the highways" (*R.* v. *Great Broughton* (1771), 5 Burr. 2700). This common-law liability has, however, been modified in various ways, and has been administered and enforced by statutes from very early times. Thus, in 1554, a statute of Philip and Mary (2 & 3 Ph. and Mar. c. 8), entitled "For amending of highways being now both noisome and tedious to travel in, and dangerous to all passengers and carriages," required the parishioners to give four days in each year "before the feast of the Nativity of Saint John the Baptist" to the work of making-up highways. They were required to attend for work equipped with "such shovels, spades, picks, mattocks, and other tools and instruments as they do make their own ditches and fences withal."

The earliest statute with which the practitioner need be concerned to-day, however, is the Highways Act, 1835, which re-enacted an earlier consolidating statute of George III. Although this Act defines as highways "all roads . . . carriage-ways, footways and pavements," this must be understood to mean that these are highways for the purposes of this Act if in fact they were already "highways" at common law. Now, at common law a "highway" is a way "which is common to all the king's people" (1 Hawk. P.C. 32, s. 1), i.e., a way over which all members of the public have the right to pass and repass. Highways may become such either by dedication by the owners to the public or by statute (e.g., s. 47 of the Town and Country Planning Act, 1947). Furthermore, twenty years' uninterrupted user by the public may constitute implied dedication.

The exceptions to the rule that all highways are repairable by the inhabitants at large are as follows: that the parish is not responsible for highways on enclosed land (*ratione clausurae*), that the parish will be free from liability if the highway has been repaired by the owner "time out of mind" (prescription), and that the owners may be liable because they hold land adjoining the highway which carries with it the liability to repair (*ratione tenurae*). This last ground is usually proved by evidence to the effect that the owners have repaired the highway for some considerable period of time. For present purposes the most important ground of exemption for local authorities lies in s. 23 of the Highways Act, 1835, which provides that *new* roads are not to be repairable by the inhabitants at large unless they have first been made up to the satisfaction of the surveyor and two justices of the peace in petty sessions. Formerly mere dedication would have made the road repairable by the inhabitants at large.

Section 62 of the 1835 Act, however, provides a procedure whereby any person or body corporate which is liable to repair any highway *ratione tenurae* may, if he or it obtains the consent of the urban district council (the successor in law of the "inhabitants in vestry assembled" mentioned in the section) apply to the magistrates for an order declaring the road repairable by the inhabitants at large and fixing an annual sum to be paid by the inhabitants towards the cost thereof, or fixing a lump sum to be paid in discharge of all future liability. Furthermore, by s. 146 of the Public Health Act, 1875, where the frontagers have made up a road for public use the urban authority may, by agreement with them, take over the road, when it will become repairable by the inhabitants at large (through the urban authority, of course); the authority may also agree to pay "any portion of the expenses of making such road." By s. 152 of the same Act, where any existing road has been "sewered, levelled, paved, flagged, metalled, channelled and made good and provided with proper means of lighting" to the satisfaction of an urban authority, it may, by notice displayed in the road, declare the road to be a highway, "and thereupon the same shall become a highway repairable by the inhabitants at large." A majority of the owners can, however, prevent the operation of the notice.

Where an urban authority is dissatisfied with the state of any street or road in its district it may, by notice to the owners or occupiers of the houses fronting thereon, require them to "sewer, level, pave, etc.," the street to its satisfaction, and, in default, may do the work itself and recover the cost in a summary manner (Public Health Act, 1875, s. 150). Where such works have been completed, the authority can then declare the street a highway repairable by the inhabitants at large (Public Health Acts Amendment Act, 1890, s. 41). Urban authorities also have the power under s. 148 of the Public Health Act, 1875, to enter into agreements with owners for the "maintenance, repair, cleansing or watering" of roads for which they are not liable on such terms as may be agreed upon.

The Act under which most private road works are done is, however, the Private Street Works Act, 1892, which is an adoptive Act. All the work of making-up, including the provision of lighting, may be done by the authority under s. 6, and the expense incurred apportioned "on the premises fronting, adjoining or abutting" on the street or road. Within one month of the publication of approved specifications for the work, the owner of any premises in the provisional apportionment of expenses may object on the ground, *inter alia*, that the street is a highway repairable by the inhabitants at large, or that the proposed works are insufficient or unreasonable or that the estimated expenses are excessive. The appeal will be heard in a court of summary jurisdiction. When the works have been carried out, the urban authority may, if it considers that the road is one which ought to be repairable by the inhabitants at large, declare it such by notice in the road itself. It may here be noted that the mere fact that the frontagers have paid for the making-up of a private road does not confer any rights on them or on the public as against the owners of the land over which the road runs (*Mowbray, Rowan and Hicks* v. *Drew* [1893] A.C. 795).

Where a local authority adopts a road under s. 19 it may be liable to pay compensation under s. 308 of the Public Health Act, 1875, to the owner of the road or the owners of the properties abutting thereon if they can prove damage (cf. *Burgess* v. *Northwich Local Board* (1880), 50 L.J.Q.B. 219). The compensation is based on the loss of value to the claimant's property due to the physical facts (*R.* v. *Wallasey Local Board* (1869), 38 L.J.Q.B. 217). An interesting modern decision on this aspect is contained in *Urban Housing Company, Ltd.* v. *Oxford City Council* [1940] Ch. 70.

Certain roads within an urban district may be the responsibility of the county council. Section 29 of the Local Government Act, 1929, made every road which was a " main " road on 1st April, 1930, the responsibility of the county council, and other roads may become " county roads " by order of the county council on the application of the urban district council, on such grounds as, for example, that the road is a means of communication between two large towns, or that it is situated in a part of the urban council's district which is of a rural character. If the county council refuses to make the order the Minister of Transport may do so on appeal (s. 37 (2)).

Trunk roads are vested in the Minister of Transport by the Development and Road Improvement Funds Act, 1909, as amended by the Roads Act, 1920, and the Trunk Roads Acts, 1936 and 1946, and he is responsible for their maintenance, and the Minister of Town and Country Planning is empowered by ss. 47–49 of the Town and Country Planning Act, 1947, to provide for the " provision or improvement " of highways necessary to enable development to be effectively carried out, and he may direct that any highway so provided or improved shall be repairable by the inhabitants at large.

Two Acts have recently been passed dealing with highways, the Public Utilities Street Works Act, 1950, and the New Streets Act, 1951, which is expressed to come into operation on 1st October, 1951. Neither enactment affects the statement of the law given above, but it will be as well to mention their objects to dispel any apprehension that such might be the case. First, the Public Utilities Street Works Act, 1950, provides a comprehensive uniform code to regulate the *breaking up* of streets, sewers, drains and tunnels under streets by statutory undertakers and also provides for the circumstances which arise when undertakers' apparatus in streets has to be moved or altered in consequence of road or bridge alterations or works of that kind.

The New Streets Act first of all requires builders who are proposing to erect estates of houses, before they begin to build, to deposit or otherwise secure to the local authority concerned such sum of money as the authority considers to be necessary to pay for the making up of the roads to such a standard as would enable the authority to adopt them with a view to their being thereafter repairable by the inhabitants at large. The builder will, of course, apportion the money among the frontagers and add an appropriate sum to the price of each house. An appeal lies to the Minister of Local Government and Planning against the findings and requirements of the local authority. Once the sum mentioned has been paid neither the owner of the land nor any subsequent owner is to be under any liability for the carrying out of street works, which liability is henceforth borne by the local authority. Section 6 of the Act provides that a majority *either* in number or in length of frontage of the frontagers on a built-up street may serve a notice on the local authority requiring it to exercise its powers under the appropriate private street works code and to secure that the frontagers carry out such works as the authority requires and the subsequent declaration of the street as a highway. This section is not to apply however " unless, in at least one case, a payment has been made or security has been given under section one of this Act by the owner of land fronting the street."

G. H. C. V.

Procedure

II—WRITS: DURATION AND ACCEPTANCE OF SERVICE

ORDER 8, r. 1, declares that no original writ of summons shall be in force for more than twelve months from the day of the date thereof, including the day of such date. There follows a provision for renewal in certain events, but even apart from the question of renewal the rule does not mean all that it appears to say. In fact the words " if unserved within that time " might well, in the interests of clarity, be written into the rule after the words " twelve months."

The effect of the expiry of the period of currency mentioned in the rule was one of the matters raised in the case of *Re Kerly, Son & Verden* [1901] 1 Ch. 467, a decision on which we can hang a discussion of a few useful points in connection with the early stages of a High Court action. In an action for an account, the defendants' solicitors, acting on instructions, endorsed the writ produced to them by the solicitors for the plaintiff as follows: " We accept service for the defendants . . . and will enter an appearance in due course." A suggestion for settlement of the action was speedily made, and since it happened that the plaintiff was in South Africa it was agreed that the proceedings should be in abeyance for two months to allow her solicitors time for communication with her. Time for appearance was extended correspondingly by letter. Hostilities in South Africa now intervened, and it was not until eighteen months later that the plaintiff's solicitors wrote to the defendants' solicitors declining the defendants' offer, announcing that they were instructed to proceed and requesting that an appearance should without delay be entered pursuant to the undertaking. But the defendants no longer desired appearances to be entered, and instructed their solicitors not to enter them unless the court should so direct. The plaintiffs moved to attach the defendants' solicitors for breach of their undertaking.

Before recounting the *dénouement*, we will take leave to comment on some incidental points arising from this recital of facts.

1. *Extension of time for appearance.*—Colloquially the time for appearance is taken to be that limited by the terms of the writ, namely, in the ordinary case within eight days after service. The form naming this period is prescribed by Ord. 2, r. 3, for all except those writs which are to be served out of the jurisdiction. No express provision is to be found in the rules for extending out of court the time for appearance: Ord. 64, r. 8, under which the time for pleading is commonly enlarged by consent, is confined to the time for " delivering, amending or filing any pleading answer or other document." But neither is there any rule of court which says that a defendant must appear within the time named in the writ. He may, on the contrary, appear at any time before judgment (Ord. 12, r. 22), and even an appearance presented after judgment will be accepted. It would be appropriate, for

instance, in a case where the defendant appearing proposed to apply to set aside the judgment. Thus, an extension by the plaintiff of the defendant's time for appearance is really an assurance that judgment in default of appearance will not be signed for the period of the extension. The plaintiff agrees to forbear taking a step which lies entirely at his option.

2. *Form and consequence of undertaking to appear.*—Order 9, r. 1, which is sidenoted "Undertaking to accept service," was provided, according to Sir George Farwell, J., because many persons do not like being personally served. It could be added that the convenience of the rule from the viewpoint of the plaintiff and his agents is often appreciated, particularly in the case of an itinerant defendant. The wording of the undertaking quoted in the *Kerly* case does not adhere slavishly to the terms of r. 1, but is the form usually adopted. The rule is in any case loosely expressed, for it says that no service of writ shall be required when the defendant by his solicitor undertakes in writing to accept service and enters an appearance. To undertake to accept something which is not required seems an office of supererogation. Still, on the face of the rule, it is more correct to talk of the delivery of a writ to a solicitor and his endorsing an undertaking as a proceeding which dispenses with service rather than as service itself. This apparent quibble is at the root of the main argument put forward in *Kerly's* case, as will presently appear.

3. *Enforcement of the undertaking.*—The course taken by the plaintiffs in *Re Kerly* was to move the court, under Ord. 12, r. 18, for the attachment of the defendants' solicitors. Hence the title of the reported proceedings. On the view that there had been no actual service of the writ, no effective application could, it was suggested in argument, be made against the defendants in the action itself. Moreover, as officers of the court, solicitors are always liable to have their conduct of litigation brought to the court's attention independently of remedies against their clients. Nevertheless an alternative, and simpler, remedy is available in the circumstances. A summons may be issued in the action to show cause why an appearance should not be entered and the costs paid by the defaulting solicitor. In fact in *Kerly's* case, though the court accepted the arguments of the plaintiff, it issued no attachment warrant. Acquitting the respondent solicitors of all wrong dealing, it simply ordered them to enter an appearance forthwith.

But we anticipate. The principal contention advanced on behalf of the solicitors was that, as over twelve months had elapsed since the issue of the writ, there was no longer any writ in existence to which an appearance could be entered. It was conceded that Ord. 8, r. 1, cited at the beginning of this article, ceased to apply once the writ was served before expiry. (It was implicit, for instance, in *Webster* v. *Myer* (1885), 14 Q.B.D. 231, that judgment in default of appearance could be entered notwithstanding the lapse of twelve months from the date of the writ, provided that, if a like period had elapsed since service, the month's notice required by Ord. 64, r. 13, should be given.) In the present case, however, it was said, there had been no service of the writ, but only a step which rendered service unnecessary. The Court of Appeal was not impressed with this attempt to dovetail r. 1 of Ords. 8 and 9. Stirling, L.J., thought the circumstances were not exactly within either rule. "In my opinion," he said, "after a formal acceptance of service of a writ in that manner it would require a strong case to say that at all events the writ ought not to be renewed." The court or a judge is authorised under Ord. 8, r. 1, to order renewal if satisfied that reasonable efforts have been made to serve the defendant, "or for other good reasons." Rigby, L.J., thought that the acceptance by the solicitors *with the authority of their clients* was equivalent to service on the clients.

In the court below, Farwell, J., had declared quite boldly that a solicitor's undertaking to appear, given with authority, constituted a contract on the part of the client by his agent to enter an appearance, differing from an ordinary contract only in that it was enforceable against the solicitor himself by attachment. As a contract it could be enforced at any time within six years in spite of the apparent limitation of the life of the writ. This view of Farwell, J., is convincing enough, and quoted in many books as the gist of the *Kerly* decision, but we think it worth pointing out that it received no support whatever from the Court of Appeal, where both lords justices confined their judgments to the special facts of the case, emphasising the actual acceptance of service (not just an undertaking to accept) and the period of two months during which it had been agreed that the offer of compromise should remain open. This is, indeed, typical of procedure cases. More than most reported decisions, they tend to go off along some byway of fact which is unlikely to recur. A case like *Re Kerly* still makes excellent illustrative material.

The ulterior motive for the dispute litigated in the case just described had to do with the statute of limitations. Had the plaintiff had to start another action with an entirely new writ, a statutory defence would have been available to the defendants. In the next article the discussion will centre on a recent case where similar motives were behind the contentions of the parties.

J. F. J.

A Conveyancer's Diary

REPORT OF COMMITTEE ON INTESTATE SUCCESSION—I

THE report of the committee on the law of intestate succession which was set up in October last year under the chairmanship of Lord Morton of Henryton has now been issued.* The terms of reference of this committee were as follows:—

(*a*) To consider the rights under s. 46 of the Administration of Estates Act, 1925, of a surviving spouse in the residuary estate of an intestate;

(*b*) To consider whether, and if so to what extent and in what manner, the provisions of the Inheritance (Family Provision) Act, 1938, ought to be made applicable to intestacies; and

(*c*) To report whether any, and if so what, alteration in the law is desirable.

The committee invited a number of organisations (which included several bodies concerned with social reform in various aspects, as well as the Bar Council and The Law Society) and individuals to submit written statements of their views on the subject-matter of this report; and in addition to the guidance provided by evidence from this quarter the committee caused to be prepared certain statistics indicating the manner in which testators on the average dispose of estates of different sizes. The committee's recommendations are, therefore, based in each case on what may be accepted to be the proved

* Command 8310. H.M. Stationery Office. 9d.

requirements of modern life, and each recommendation is supported by a full statement of the reasons which led the committee to make it. It is not possible in a summary of this report to do more than refer occasionally to the reasons which prompted individual recommendations, but there are two considerations which, although nowhere stated as such, appear to have affected the report as a whole and every recommendation in it, and a brief reference to these overriding considerations will not be out of place.

The first requirement of any code of law dealing with intestate succession, in the committee's view, is that it should be as clear and as easy to ascertain as possible. Again and again suggestions which may ideally produce the fairest distribution of an intestate's estate among those who have some claim to it are rejected in favour of simple suggestions because of the desirability of having simple and comprehensive rules, subject to the fewest possible exceptions, in this branch of the law; and a similar motive has prompted the committee to reject suggestions whereby certain provisions of the code could be made flexible and adjustable to current changes in, e.g., the value of money, by conferring rule-making powers on the Lord Chancellor: "We feel that on this particular subject a person should be able to ascertain the entire provisions of the law by reference to one document only, the Act." How refreshing this is at a time when it is accepted with complete complacency in Government circles that, say, the village shopkeeper who gets himself into trouble over prices has only himself to blame if he does not read and understand a whole stream of Ministerial orders, regulations and circulars.

The other principal consideration underlying many of these recommendations is a realisation of the great inconvenience that results from the conferment of life interests in funds of inconsiderable size, or in funds of any size where there is no strong reason against an immediate division of the whole estate. Those whose duty it is to advise beneficiaries and personal representatives on the application of the law on the distribution of intestates' estates will readily agree that nothing in the present code gives more trouble and dissatisfaction than the existing rights of a surviving spouse to a life interest in a moiety or the whole of the residuary estate.

The committee's recommendations appear under two heads: (1) the rights of a surviving spouse, and (2) application of the Inheritance (Family Provision) Act, 1938, to intestacies. The recommendations under the first head deal with two different problems, viz., the distribution of an intestate's estate excluding the matrimonial home with particular reference to the rights of a surviving spouse, and the devolution of the matrimonial home, as to which it is recommended that the surviving spouse should be given an option of purchase. I will summarise this week the committee's recommendations under the first head relating to distribution of the estate generally, and leave till next week the recommendations relating to the matrimonial home and the application to intestacies of the Act of 1938.

There are four separate cases of distribution of the estate generally with which the report deals, as follows:—

(a) The intestate leaves a spouse and issue

At present, under s. 46 (1) (i) of the Act of 1925, the surviving spouse (widow or widower) is entitled to the personal chattels and a charge for £1,000, free of death duties and costs, with interest at £5 per cent. from the death until paid or appropriated, and subject thereto to a life interest in a moiety of the residuary estate. The committee recommends that the surviving spouse (widow or widower) should in addition to the personal chattels be entitled to a charge for £5,000, free of death duties and costs, with interest at £4 per cent. until paid or appropriated, such interest to be satisfied out of the income of the residuary estate so far as possible, and subject thereto to a life interest in a moiety of the residuary estate as before. In addition, both in this and the other three cases mentioned below, the surviving spouse should, in the committee's view, have an option to purchase the matrimonial home.

The drop in the rate of interest is recommended to bring this provision more into line with current yields, and the recommendation to increase the surviving spouse's charge to the sum of £5,000 is to some extent prompted by the fall in the value of money since the law of intestate succession was last amended in 1925. But it is interesting to note that a census taken by the Probate Registries throughout England and Wales specially for the committee showed that in the case of wills executed from the year 1940 onwards 73 per cent. of all testators leaving an estate under £2,000, and 65 per cent. of all testators leaving an estate between £2,000 and £5,000, left the whole or a major part of their estate to the surviving spouse absolutely. The proportion in the case of estates over £5,000 was forty-five. The committee felt, therefore, that although their recommendation to increase the surviving spouse's charge to £5,000 must, if accepted, necessarily operate at the expense of the children of the intestate, the statistics show that this is a result which most testators wish to bring about: "We think that in making such generous provisions for the widow at the expense of the children, the testator must be influenced by the belief that she will make such provision for the children as she can." The hardships which may arise, especially as regards children by an earlier marriage, supply an argument for the committee's recommendations as to making the Inheritance (Family Provision) Act, 1938, apply to intestacies.

The proposal that interest on the £5,000 should, if possible, be paid out of income is prompted by the fact that such interest, if paid out of capital, attracts income tax despite its origin as capital.

Finally, the committee recommend that the spouse should be given the option of claiming a capital sum in place of his or her life interest in a moiety of the residuary estate, to be calculated according to tables, proportionately to the spouse's expectation of life. The committee refer to the provisions of s. 48 (1) of the Act of 1925, which gives the personal representative power, with the consent of the spouse, to purchase or redeem a spouse's life interest in the residuary estate or a part thereof by paying the capital value thereof calculated according to tables selected by the personal representative, but point out that this power is seldom used, partly, perhaps, because it is little known, and partly because the personal representative's power to select tables for the purpose of capitalisation may seem unfair to the surviving spouse. The recommendation, therefore, is that the spouse should be given the initiative in this matter, and that the method of calculating the proportionate amount of the capital sum payable to her or him be based on simple tables which should form part of the Act. "It is most essential that the whole procedure should be as simple as possible."

This recommendation would do much to reduce the number of small life interests subsisting under intestacies. The other recommendations of the committee under this head go even further in this direction.

(*b*) *The intestate leaves a spouse and a parent or parents, but no issue*

Under the existing law the surviving spouse takes the personal chattels and a charge for £1,000, as above mentioned, and a life interest in the whole of the residue; subject thereto the intestate's parents take in equal shares absolutely (s. 46 (1) (iii) of the Act of 1925).

The committee recommends that in such a case the spouse's charge should be increased to £20,000 and the balance of the estate divided as to one-half to the spouse and as to the other to the intestate's parent or parents absolutely.

(*c*) *The intestate leaves a spouse and one or more brothers or sisters of the whole blood (or issue of deceased brothers or sisters of the whole blood) but no issue or parent*

As under (*b*), but it is recommended that the half share of the balance of the estate which under (*b*) would go to the intestate's parents should be held on the statutory trusts for the brothers and sisters of the whole blood of the intestate. (The statutory trusts include a substitutional trust for issue of deceased brothers and sisters (s. 47 (1) of the Act of 1925).) Under the existing law the surviving spouse's rights are the same in this as in the previous case.

(*d*) *The intestate leaves a spouse but no issue or parents or brothers or sisters of the whole blood (or issue of deceased brothers or sisters of the whole blood)*

It is recommended that the whole estate should go to the surviving spouse absolutely. At present, subject to the spouse's right to personal chattels and a charge for £1,000 and to a life interest in the residue, under s. 46 (v) of the Act of 1925 a host of relations (brothers and sisters of the half blood, grandparents, and uncles and aunts of the whole and of the half blood respectively) are given interests in the estate, and it is only in default of all such relations that the surviving spouse takes absolutely; but in the committee's view "the average individual would not wish next of kin who are remoter than brothers and sisters of the whole blood or the issue of such deceased brothers and sisters to benefit from the estate at the expense of the surviving spouse." Few will question this conclusion, and most of those who have given any thought to these matters will welcome these recommendations as a whole as an expression of an approach, at once commonsense and humane, to problems which have for too long been infected by considerations of social justice long outworn.

"A B C"

Landlord and Tenant Notebook

CONTROL AND *ONUS PROBANDI*

THE "permitted rent" of controlled premises may, as was emphasised by *Davies* v. *Warwick* [1943] K.B. 329 (C.A.)—in which a tenant, on proving that a house let to him in October, 1939, at 12s. 6d. a week, had been let to someone else in 1916 at 4s. 3d. a week, recovered two years' excess payments—depend on facts unknown to the landlord. The purchaser of a reversion to such premises runs a risk; but even if the tenant in possession does not engage in research and establish that he is paying too much, the purchaser has no right to assume that he is paying anything less than the permitted amounts. This has recently been established by *Keane* v. *Clarke* [1951] 2 All E.R. 187; 95 SOL. J. 399 (C.A.). The defendant in that case had bought a North London property comprising a flat let by the vendor to his (the vendor's) mother-in-law, at a weekly rent of £1 3s. 6d., "including 1s. increase of rates." That tenancy having come to an end, the defendant let the flat to the plaintiff in November, 1949, at the increased rent of £1 15s. a week; he did that, he explained later in the witness-box, to enable him to meet his commitments.

The plaintiff brought an action to recover overpayments and called evidence to show that the above-mentioned vendor had, before letting the flat to his mother-in-law, let the flat to a stranger at £1 2s. 6d. a week, this tenancy having been entered into or commenced on 27th May, 1944. No evidence was given about any letting before that date, and the vendor was not called as a witness. The county court judge considered that the plaintiff had not made out her case, and she appealed.

The Court of Appeal held that in the absence of any evidence of previous lettings the 1944 letting should be treated as the first letting and that the figure at which the flat was so let should be treated as the then permissible or the standard rent. "I think," said Evershed, M.R., "that the proper inference is that the standard rent of these premises was 22s. 6d., but I think also that the permissible rent should be treated as 23s. 6d."

It will be observed that two presumptions are set to work by the learned Master of the Rolls. The inference about the standard rent might be considered referable to the principle that a landlord ordinarily gets as much for his property as he can, so that if indeed there had been previous lettings the letting in 1944 would, it was more likely than not, be at the same rent. It may be that the defendant, unaware of this particular letting, thought that very possibly reduced terms are granted to mothers-in-law; but his ignorance would not avail him, any more than did the ignorance of the defendant in *Davies* v. *Warwick*. The other presumption, that 23s. 6d. was the permitted rent, appears to rest on the principle "*omnia rite et solemniter praesumuntur esse acta*," for the defendant is not stated to have served any notice of increase on his mother-in-law. The presumption has, however, been held to be effective in a number of such cases, beginning with *Summers* v. *Donohue* [1945] K.B. 376 (C.A.).

The short assenting judgment delivered by Denning, L.J., contains what may be considered some rather sweeping statements, the learned lord justice's view being that both the law and good sense make it the duty of a landlord to find out what the standard rent is; good sense, because he is in a much better position to know it than is the tenant. Perhaps it is not the function of the "Notebook" to deal with what is good sense, but a perusal of the judgments in *Davies* v. *Warwick* (though they contain some exaggeration) suggests that the Court of Appeal has been known to show considerable sympathy with the landlord; the defendant, according to one of the lords justices, had found to his cost that house property was a dangerous form of investment. As regards the law, Denning, L.J., pointed out that (the tenancy being a weekly one) the Increase of Rent, etc. (Restrictions) Act, 1938, obliged the landlord to provide a rent book which (this is by virtue of the Rent, etc., Restrictions (Amendment) Act, 1933, s. 14 (1), and the Rent Restrictions Regulations, 1940, Sched. II, Pt. I, para. 4) states what the standard rent of the premises is. But it may be recalled that in *Austin* v. *Greengrass* [1944] K.B. 399, a Divisional Court recognised the fact that a landlord might not know what the standard rent of the premises was—in the case before it the necessary apportionment had not been made—holding, it is

true, that it was the duty of the landlord to issue a summons to determine the amount, but saying that, pending the decision, he could enter a statement to the effect that an application was to be made immediately and the figure would be inserted as soon as determined. It can also be said that the Increase of Rent, etc., Restrictions Act, 1920, s. 11, is content to impose a duty to supply a statement *as to* what is the standard rent. There may be circumstances in which a landlord would not be guilty of failure or falsehood under that section if he replied that he hadn't a clue. But I do not suggest that the defendant in *Keane* v. *Clarke* could have discharged his obligation under the section by such an answer: *Austin* v. *Greengrass* shows that he should have at least replied that while he did not know, the rent had been £1 3s. 6d. a week including a 1s. increase, and that he was about to apply to the local county court under the Rent, etc., Restrictions Act, 1923, s. 11, to determine the amount. Further evidence of the fact that even the Acts appreciate that there may be some difficulty in answering such a question is afforded by the provision in the Rent, etc., Restrictions (Amendment) Act, 1933, s. 6, authorising courts, when it is not "reasonably practicable" to obtain sufficient evidence in circumstances set out, to determine the standard rent as being, for the purposes of proceedings before it, of such amount as it thinks proper, having regard to the standard rents of similar houses in the neighbourhood: and the figure so determined becomes the standard rent until further order.

Another recent case in which research by a tenant has produced results is *R.* v. *Judge Pugh, ex parte Graham* [1951] 2 All E.R. 307; 95 SOL. J. 431 (C.A.). I shall be dealing with that case in connection with the jurisdiction of rent tribunals; for present purposes all that I need to mention is that a tenant, after successfully applying for a determination of standard rent on the footing that his flat had first been let since 1st September, 1939 (i.e., under the Landlord and Tenant (Rent Control) Act, 1949), discovered—or, according to Goddard, L.C.J., thought he had discovered—facts showing that it had been let as part of a larger dwelling-house before that date. At all events, landlords of controlled premises may well agree with Walpole's observation that it is "pleasanter to read history than to live it."

R. B.

HERE AND THERE

HEAVY OUTPUT

IN the pause for breath and retrospection afforded us by the Long Vacation, the first reflection that springs to the exhausted mind of the diligent student of case law is the truly astonishing vitality of the House of Lords as a supreme court of appeal. From November to June it delivered itself of no less than twenty important decisions of general interest to the profession, many of them long and complicated, besides nine of more limited and specialised application. Then in July it finished off with a veritable pyrotechnic blaze of another seven—all of interest, some of great interest. The finest and most spectacular among those last seven rockets was undoubtedly *British Movietonews, Ltd.* v. *London & District Cinemas, Ltd.*, long expected and likely to be long discussed. When that case first emerged from the Court of Appeal, provocative and refulgent with the thought and expression characteristic of Denning, L.J., there were many (and not only the timid souls) who blinked and thought they saw the portent of a comet importing change of times and states and boding the utter destruction of the law of contract, so that the enforceability of settled agreements would thenceforth be measured by the length (and strength) of the county court judge's foot and his idea of what was just and reasonable. On the other hand there were others, among them men grave in years and ripe in learning, who smelt no heresy in the doctrine that the court might qualify a contract when an unexpected turn of events produced a situation in which absolute words led to a result that the mind never dreamt of and who would unhesitatingly have worked out some sort of a qualification, say, in the case of Jephta's daughter. The appeal was of such stuff as called for a master hand to fashion a solution and called so powerfully that Lord Simon was charmed back to the judicial activities of the Lords, which he has renounced ever since the establishment (contrary to his judgment of sound constitutional practice) of the Appellate Committee. In the clear, steady beams of his temperate lucidity the problem immediately resolved itself into far simpler lines than before. The respondents' counsel, abandoning forthwith their most advanced positions, fought out the action on the familiar battle-ground of construction and, standing there gallantly, fired to the last round. The final result seems to be (if this is not putting it too summarily) that a contract either falls by frustration or stands by construction, but there is no half-way house where a bit of it can be knocked off, while the rest goes marching on.

LITIGANT IN PERSON

ANOTHER of this last batch of decisions, *Capital & Provincial Property Trust* v. *Jack Morris Rice* (I think that as an historic figure he deserves his full array of names), has an interest beyond the ironing out of yet another crease in the crumpled tapestry of the Rent Restrictions Acts. That may be useful but there's nothing particularly out of the way about it. What is out of the way is to see a litigant in person making good in the Lords and enjoying not only that full and fair hearing which one takes as a matter of course up there, but also the fruits of victory. One can hardly think of a more unlikely or more esoteric subject than the Rent Acts for a layman to tackle single-handed. A mariner might conceivably argue seamanship in the Admiralty Court; an inventor might perhaps take on the Patent Bar on their own ground, but which of us can confidently assert a battle-hardened mastery of the statutory mysteries that keep a roof over our heads and the wolf of a notice to quit from the door? Well, Mr. Rice, having listened intelligently while learned counsel in the county court and the Court of Appeal won his case for him in due and conventional form, decided to fight the last battle on his own unaided resources and stand on his own feet and not by delegation on theirs. Nor was the issue a foregone conclusion, for two days of the hearing saw him putting his case and citing sections and authorities with the most admired and weighty composure. It is a very long time since a litigant in person appeared in the Lords—certainly more than ten years, if one does not count an occasion when a gentleman well known for his personal appearances before the Scottish courts attempted, in the teeth of established practice, to argue on behalf of a limited company with which he was intimately connected, but got very little distance. Usually the litigant in person is no more than a moderately comic interlude in the legal drama (at best funny without being vulgar), but not so in the Lords this time.

RICHARD ROE.

Mr. G. F. Darlow, the Town Clerk of Reading, won the monthly bogey competition of the Calcot Golf Club.

Mr. G. Hamilton-Sharp, solicitor, of Weymouth, won the Dorset Law Society Golf Cup at Came Down.

NOTES OF CASES

HOUSE OF LORDS

TWO FLATS LET AS ONE: APPORTIONMENT

Capital and Provincial Property Trust, Ltd. *v.* Rice

Lord Porter, Lord Morton of Henryton, Lord Reid, Lord Tucker and Lord Asquith of Bishopstone. 25th July, 1951

Appeals from the Court of Appeal (94 SOL. J. 435).

In 1934 two flats in a block belonging to the appellants were let together to one tenant who made a communicating door between them and occupied them as one dwelling at £430 a year. In February, 1939, the flats were let in similar circumstances to another tenant at £365 a year. The rateable value of the dwelling as a whole was such that it did not fall within the Rent Restriction Acts, though the flats, taken as separate, were within the Acts. The flats were damaged by a bomb during the war and the tenancy came to an end. Flat No. 27, which was not very badly damaged, was repaired separately and let in 1942 at £195 a year. In 1946 the other, No. 28, was repaired and let to the plaintiff at £250 a year. He instituted the present proceedings under s. 12 (3) of the Rent, etc., Act, 1920, for apportionment of the rent of No. 28. The landlords applied in the proceedings for determination of the standard rent under s. 12 (1) (*a*) of the Act of 1920 as amended by the Rent, etc., Act, 1939. They contended that, as the two flats when let together were outside the Rent Restriction Acts, neither was let within the meaning of s. 12 (1) (*a*) of the Act of 1920, as amended in 1939, on 1st September, 1939, so that each was first let after that date. Accordingly, the standard rents of the separated flats were to be found not by apportionment of the rent of the uncontrolled unit but by taking the rent at which each part was first let, in the case of No. 28 £250 a year. Judge Dale held that the flats were on 1st September, 1939, "let" within the meaning of s. 12 (1) (*a*), and he made the apportionment which the tenant sought. The landlords' appeal was dismissed (Denning, L.J., dissenting), and they now appealed to the House of Lords. The House took time for consideration.

LORD PORTER said that the question was whether the rent of a dwelling-house to which the Acts did not apply on 1st September, 1939, could be apportioned in order to ascertain the standard rent of a comprised portion which was separately let at a later date and was then for the first time subject to control. If flat No. 28 had been separately let on 1st September, 1939, and its separate rateable value alone were to be considered, the Acts then applied to it. But it was not then let as a separate entity and it was claimed that it was not then let within the meaning of the Acts.

It was said that a new flat came into existence when the plaintiff became tenant. In a sense it was true that any division of one property into two or any union of the properties into one created something different from the original whole or parts, but a solution founded on such considerations would play havoc with the Act, defeat its objects, and make apportionment meaningless. Some limit to what constituted a change of identity must be laid down. Whether in any particular case there had been a sufficient alteration in the premises was a matter for the judge if he had material on which to base his finding. Flat No. 28 was let on 1st September, 1939, and, if let separately then, would have been within the control of the Acts. But, though let on the material date, it was not then let as a separate dwelling. It had to be determined whether the provisions as to apportionment contained in s. 12 (3) of the Act of 1920 had any application. At the relevant date the premises demised were let at a rent which took them outside control and were of a rateable value beyond that bringing them within the Act. It was therefore said that the Act did not apply to them and that the rent of a house or dwelling outside the Act could not be apportioned even if the divided portions were each within the Act because either their rent or rateable value was below the prescribed figure. It was true that it was not possible to say whether that portion was within the Acts or not until apportionment had taken place, but once the rent had been apportioned the result was known, and if the consequence of the apportionment was to attribute a rent to a divided portion which brought it within the Acts that was the standard rent. The question remained whether that view was consistent with ss. 11 and 12 (1) and (2) of the Act. The solution which he (his lordship) suggested was that the period to be looked to at which the premises constituted a separate dwelling was that at which the court was required to apportion the rent; and the premises referred to were the divided portion and not those the rents of which were to be apportioned. Flat No. 28 was controlled because its rateable value was £79, and since 1938 that was the sole criterion for determining whether premises were within the Acts. There was in existence, when the proceedings were taken in the county court, a controlled flat which was let on 1st September, 1939. But, as it was not then separately let, its standard rent could only be ascertained by apportionment, and it was therefore necessary to apportion the 1939 rent. It was further said that s. 5 of the Act of 1938 made it imperative that apportionment should be confined to cases where both the undivided house and the divided portion were dwellings to which the Act applied. But he (his lordship) could not think that it had any such effect. The appeals should be dismissed.

The other noble and learned lords agreed. Appeals dismissed.

APPEARANCES: *L. A. Blundell* (*Stephenson, Harwood and Tatham*). The tenant appeared in person.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

WORKMEN'S COMPENSATION: TRANSITIONAL PROVISIONS

Mobberley & Perry, Ltd. *v.* Holloway

Lord Simonds, Lord Goddard, Lord Morton of Henryton, Lord Radcliffe and Lord Tucker. 26th July, 1951

Appeal from the Court of Appeal (94 SOL. J. 566).

The respondent workman was employed by the appellant company as a coal hewer for thirty years before 11th October, 1946. Thereafter he was in the wood-working industry until May, 1949. Since then he had done no work. On 29th August, 1949, a medical board gave a certificate in accordance with the Coal Mining Industry (Pneumoconiosis) Compensation Scheme, 1943, stating that he was totally incapacitated by pneumoconiosis from 17th May, 1949. If the Workmen's Compensation Acts and the Scheme of 1943 continued to apply to the workman, it was not disputed that he was entitled to workman's compensation; but the employers contended that they did not and that his remedy lay under the National Insurance (Industrial Injuries) Act, 1946. The county court judge so held, and the workman appealed. The Court of Appeal reversed that decision, and the employers now appealed to the House of Lords. By s. 89 (1) of the Act of 1946, "Workmen's compensation shall not be payable in respect of any employment on or after the appointed day, and accordingly the enactments set out in the ninth schedule to this Act are hereby repealed as from that day to the extent mentioned in the third column of that schedule: Provided that—(*a*) the said enactments shall continue to apply to cases to which they would have applied if this Act had not been passed, being cases where a right to compensation arises or has arisen in respect of employment before the appointed day, except where, in the case of a disease or injury prescribed for the purposes of Pt. IV of this Act, the right does not arise before the appointed day and the workman, before it does arise, has been insured under this Act against that disease or injury." The House took time for consideration.

LORD SIMONDS said that the House was not bound by *Harris* v. *Rotol, Ltd.* [1950] 2 K.B. 573; 94 SOL. J. 238, and would prefer to consider the matter afresh in the light of *Hales* v. *Bolton Leathers, Ltd.* [1951] 1 T.L.R. 570; *ante*, p. 316. It could not be denied that the workman would be entitled to compensation under the Workmen's Compensation Acts if the Act of 1946 had not been passed. The question was whether his right had been taken from him by s. 89 (1) of that Act. The opening words of the subsection were significant: "Workmen's compensation shall not be payable in respect of any employment on or after the appointed day." The words "on or after the appointed day" qualified the word "employment." But incapacity after the appointed day might be the result of employment before it. The proviso to s. 89 (1) provided for such a case. The right to compensation in the case of a disease or injury prescribed for the purposes of Pt. IV of the Act was taken away only if (*a*) the right to compensation did not arise before the appointed day, and (*b*) the workman, before it did arise, had been insured under the Act of 1946 against that disease. The workman was admittedly disabled by pneumoconiosis due to employment before the appointed day, but his right to compensation did not arise before the appointed day. He was not, however, insured against pneucomoconiosis under the Act of 1946. He was, therefore, not within the exception to the proviso. So far there

seemed to be no answer to the workman's claim, but the employers relied on *Harris* v. *Rotol, Ltd., supra*. That decision was not easy to follow. He (his lordship) differed from the opinion of the Court of Appeal, which was really the foundation of its decision, that where in the case of an industrial disease no certificate had been given before the appointed day that was an end of the matter, for the certifying surgeon, being *functus officio*, could not give a certificate, and without a certificate a right to compensation could not arise. It was clear that he was not for all purposes *functus officio*: see, for example, the Pneumoconiosis (Medical Arrangements) (Transitional) Regulations, 1948, and it appeared to him (his lordship) that, where a workman suffering from a disability was not insured under the Act of 1946 so as to obtain benefit under it, there were no provisions of the Act which denied the workman recourse to him for the purpose of obtaining the proper certificate for the purposes of the Workmen's Compensation Acts. The appeal would be dismissed.

The other noble and learned lords agreed. Appeal dismissed.

APPEARANCES: *F. W. Beney*, K.C., and *E. G. H. Beresford* (*E. P. Rugg & Co.*, for *Buller, Jeffries & Kenshole*, Birmingham); *Gilbert Paull*, K.C., and *Arthur James* (*Stafford Clark & Co.*, for *Hooper & Fairbairn*, Dudley).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF APPEAL

LAND COMPULSORILY ACQUIRED: ASSESSMENT OF COMPENSATION

Higham *v.* Havant and Waterloo Urban District Council

Cohen, Singleton and Morris, L.JJ.
5th June, 1951

Appeal from a decision of the Divisional Court ([1951] 1 K.B. 509; *ante* p. 30) on a special case stated by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919.

The respondent urban district council proposed, in exercise of power given by a private Act, to acquire for defence against the sea certain land including two plots used by their owner, the claimant, for movable dwellings (caravans). The plots had been bought by the owner in various parcels before August, 1936. No town-planning scheme had been prepared covering the area in which the plots were, although the Minister of Health had in 1928 confirmed a resolution by the local planning authority to prepare a scheme. A statutory general interim development order was in force when the claimant began using her land for caravans. In December, 1937, she applied for a licence under s. 269 of the Public Health Act, 1936, so to use the land, which licence was deemed to have been granted unconditionally by implication (s. 269 (4)). The urban district council having obtained power to acquire the land in 1947, notices to treat were served on the claimant in June, 1948. The compensation due to her fell to be assessed under Pt. V of the Town and Country Planning Act, 1947, and the assessment was made by an official arbitrator under the Acquisition of Land (Assessment of Compensation) Act, 1919. The Act of 1947 was passed on 6th August, 1947. By s. 120 the sections, among others, in Pt. V were to come into force at once. The remainder, which include s. 75, were made to come into force on 1st July, 1948. Section 51 of the Act of 1947 concerns the acquisition of land after the appointed day. The compensation in question fell to be assessed under s. 55, which adapts s. 51 to the case of land compulsorily acquired between the passing of the Act and the appointed day. By s. 55 (2) the value of any interest in land so acquired is to be "ascertained by reference to prices current immediately before 7th January, 1947, and . . . the interest shall be deemed to have been subsisting immediately before that day subject to all incidents to which it is subject on the date of the notice to treat . . ." By s. 75 (1), where any use made of land on the appointed day was begun in contravention of previous planning control, the provisions of Pt. III (which includes s. 23) of the Act with respect to enforcement notices are to apply to it "provided that an enforcement notice shall not be served by virtue of" s. 75 "in respect of any . . . use . . . at any time after three years from the appointed day." By s. 23 no enforcement notice may be served after four years after the beginning of the development (which includes a change in the use of land: s. 12) complained of; and by s. 75 (9) the use of land is deemed to have been begun in contravention of previous planning control where at the material time the land was subject to a resolution to prepare a planning scheme. The official arbitrator awarded compensation subject to the question whether on or after 1st July, 1948, the claimant's use of the land could be the subject of an enforcement notice under s. 75 of the Act of 1947, and, if so, whether the arbitrator could take that into account in assessing the compensation. The Divisional Court, on the construction of the relevant statutory provisions, answered both questions in the affirmative. The claimant appealed.

COHEN, L.J., said that he found himself so completely in agreement with both the conclusion and the reasoning of the judgment of the Divisional Court, delivered by Parker, J., that while he appreciated the arguments which had been addressed to the court, he did not wish to burden the law reports with any further reasons of his own.

SINGLETON and MORRIS, L.JJ., expressed their agreement in similar terms. Appeal dismissed.

APPEARANCES: *Percy Lamb*, K.C., and *Geoffrey Howard* (*Mortimer Silverman & Co.*, for *James Barnes*, Hayling Island); *Harold Williams*, K.C., and *W. L. Roots* (*Lees & Co.*)

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

CHANCERY DIVISION

ANCIENT LIGHT: ERECTION OF BUILDING ON ADJACENT LAND: GROUND LANDLORD'S AGREEMENT

Blake & Lyons, Ltd. *v.* Lewis Berger & Sons, Ltd.

Wynn Parry, J. 5th July, 1951

Adjourned summons.

The plaintiffs were underlessees for the residue of a term of years expiring in 1973 of the ground floor and basement of premises in London. The premises had an ancient light, namely, a window facing the adjacent premises. The head lease was granted "subject . . . to all rights and easements belonging to any adjacent property and subject to the adjacent buildings, or any of them, being at any time or times rebuilt or altered according to plans both as to height, elevation, extent and otherwise as shall or may be approved by the ground landlord for the time being." The defendants, who were the lessees of the adjacent premises, began to erect on that site a building which, as the plaintiffs alleged, would, if completed, obstruct the ancient light on their premises; the defendants produced an agreement with the ground landlord of the plaintiffs' premises authorising them to erect the building. The plaintiffs claimed an injunction and damages.

WYNN PARRY, J., said that, on the true construction of the head lease, the latter reserved to the ground landlord any easement of light then or afterwards acquired over any adjoining property; there was no compelling reason why the words "adjacent property" or "adjacent buildings" in the head lease should be qualified, namely, why they should apply only to adjacent premises which were the property of the ground landlord. The introduction of such qualification would be the result not of necessary implication but of speculation, and that was not permissible under the recognised canons of construction. The plaintiffs were seeking to establish that they had an easement of light; the onus was on them to show that they had such easement. On the construction which he (the learned judge) had placed on the clause they had no such easement. It followed that the defendants were entitled by way of defence to plead and rely on the document which showed that the plaintiffs had failed to established their claim to the easement.

APPEARANCES: *G. C. D. S. Dunbar* (*Beaumont & Son*); *G. R. Upjohn*, K.C., and *Maurice Berkeley* (*Herbert Smith & Co.*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

MORTGAGE: ATTORNMENT CLAUSE: MORTGAGOR CLAIMING PROTECTION OF AGRICULTURAL HOLDINGS ACT

Steyning and Littlehampton Building Society *v.* Wilson

Danckwerts, J. 6th July, 1951

Adjourned summons.

An owner of land consisting of a market garden and nursery gardens obtained an advance of £4,500 from a building society and secured it by a mortgage on his land; the mortgage deed contained a clause whereby the mortgagor attorned tenant to the mortgagee at a yearly rent of 6d. if demanded; the mortgagee was entitled to determine the tenancy by three days' notice

in writing and to take possession of the property. The mortgagee gave the mortgagor notice of determination as provided and claimed possession of the land, but the mortgagor claimed that the notice was ineffective by virtue of the Agricultural Holdings Act, 1948, and that he was entitled to the protection of the Act.

DANCKWERTS, J., said that the case illustrated again the undesirability of retaining in mortgages an attornment clause which was entirely obsolete, and at the present time did not perform a useful purpose. The Agricultural Holdings Act, 1948, and the Agriculture Act, 1947, could not have been intended to apply to anything other than true transactions between landlord and tenant in respect of agricultural holdings. The tenancies created for the purpose of farming land were the subject of tenancy agreements and not intended to be artificial tenancies created either under statute or by an attornment clause in the mortgage deed for the purpose of providing a security to a lender. The case was different from *Portman Building Society* v. *Young* (*ante*, p. 61; [1951] 1 All E.R. 191); in that case there was a rent in the attornment clause of a real money value, and it was because it was of a real money value that the case came within and was not excluded from the provisions of the Rent Restriction Acts. In the present case, the tenancy created by the attornment clause was at a yearly rent of 6d., if demanded. The true nature of the transaction would be disregarded and the provisions of a statute passed for a very different purpose would be applied in a highly artificial manner if the attornment clause had the effect of creating an agricultural tenancy for the purpose of the Agricultural Holdings Act, 1948. Accordingly, the mortgagor was not entitled to the protection of the Act and the mortgagee was entitled to possession.

APPEARANCES: *J. L. Arnold* (*Lewis, Holman & Lawrence*, for *Raper & Co.*, Chichester); *G. C. D. S. Dunbar* (*Montagu's and Cox & Cardale*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

ANNUITY FREE OF INCOME TAX: BUSINESS LOSSES OF ANNUITANT: REPAYMENT OF TAX: ANNUITANT'S ACCOUNTABILITY TO TRUSTEES

***In re* Lyons; Barclay's Bank, Ltd. *v.* Lyons**

Romer, J. 11th July, 1951

Adjourned summons.

By his will dated 8th October, 1942, the testator directed his trustees to invest his residuary estate and to pay the sum of £10 each week free of income tax to his son. The testator died on 25th March, 1946, and the trustees paid the annuity from that date out of dividends received by the trustees as income of the residuary estate; income tax at the standard rate was borne by the estate by deduction at the source. In the financial years 1946–47 and 1947–48 the son sustained a substantial loss in his business in respect of which he claimed, and obtained, relief under the Income Tax Act, 1918, s. 34. The trustees asked the court to determine whether the son was liable to account for and pay to the trustees in respect of his annuity sums recovered by him in respect of allowances and reliefs for income tax for 1946–47 and 1947–48.

ROMER, J., said that it was fully established by *Inland Revenue Commissioners* v. *Cook* [1946] A.C. 1 that if a testator gave an annuity free of tax he conferred on the annuitant two benefits, first, the amount of the annuity, and, secondly, the amount of the tax payable on the annuity in the annuitant's hands. If income tax were ultimately found to be payable in respect of the annuity, having regard to the tax legislation and to the circumstances of the annuitant in any particular year, then the amount of that tax was regarded as a gift by the testator to the annuitant. He (the learned judge) was unable, however, to regard this "additional gift," as it had been called, as a bequest in the full sense which that word ordinarily bore, for in his judgment it was a gift for a particular purpose and for no other, and if it were not required to answer that purpose, it failed and could not be applied to some other purpose instead. If the contention advanced on behalf of the annuitant were correct, the amounts which the trustees paid to the Inland Revenue in the relevant years would not go in relief of the annuitant's tax liability, which was nil, but in relief of his business losses. There was no trace of an intention by the testator in his will that such losses should fall upon his residuary legatees in exoneration of the annuitant. The object of the testator in giving an annuity free of tax was surely to exonerate the annuitant from a particular burden, e.g., tax, and not from some other burden such as a loss in his business. Accordingly the whole of the sum recovered under s. 34 for the years 1946–47 and 1947–48 in respect of income tax paid by the trustees was repayable to them. Had the annuitant carried forward his business losses under s. 33 of the Finance Act, 1926, instead of claiming repayment of tax under s. 34 of the Act of 1918, different considerations might well have arisen. *In re Pettit* [1922] 2 Ch. 765 applied.

APPEARANCES: *Droop* and *J. H. Stamp* (*Saville & Mannooch*); *E. G. Wright* (*Wright & Webb*).

[Reported by CLIVE M. SCHMITTHOFF, Esq., Barrister-at-Law.]

SOLICITORS: INCOME TAX: ENTERTAINMENT EXPENSES

Bentleys, Stokes & Lowless *v.* Benson

Roxburgh, J. 27th July, 1951

Case stated by the Commissioners for the Special Purposes of the Income Tax Acts.

The appellant firm sought to have deducted in the computation of their profits for income tax purposes £539 spent during the relevant year in entertaining to lunch or dinner at restaurants clients of the firm to whom professional advice was given on such occasions and charged for in the ordinary way. The firm had its office in the City of London. Clients living in the West End were entertained at restaurants in that district because they might have been lost to the firm as clients had they had to go to the City for consultations. It was contended for the solicitors that the test to be applied was whether the expenses were incurred for the purpose of making profits, and that the question of "necessity" was immaterial, and that the sum claimed should be deemed wholly and exclusively laid out for professional purposes. It was argued for the Crown that the expenditure in question was not wholly and exclusively laid out for the professional purposes of the appellant firm within r. 3 (*a*) of the rules applicable to Cases I and II of Sched. D to the Income Tax Act, 1918. The Special Commissioners accepted that incurring the expenditure in question was convenient and politic, but they refused to hold that it was necessary, or wholly and exclusively incurred for the purposes of the firm's business so as to be deductible. The firm appealed.

ROXBURGH, J., said that neither in the analysis of r. 3 (*a*) by Sir Ernest Pollock, M.R., in *Union Cold Storage Co., Ltd.* v. *Jones* (1924), 8 T.C. 725, at p. 741, nor in the rule itself did the word "necessary" appear. The finding that the money was not laid out or expended wholly or exclusively for the purposes of the firm's profession was a positive conclusion reached for two reasons: first, that it was not necessary for the "purposes of transacting the business in hand or for the profession generally." When the commissioners used "necessary" they must have been using it in the strict sense, and the authorities showed that that test was erroneous. The first conclusion was, therefore, wrong. The commissioners' second conclusion was that the expenditure involved an element of hospitality and the relationship of host and guest. It seemed to him that the expenditure was no less for a professional purpose merely because it involved an element of hospitality, and that the evidence pointed to the hospitality being of a character which was consistent with an exclusively business nature. There was one other point, on which no one had ever relied before: that the expenditure included a partner's own entertainment. That had caused a good deal of doubt. On the whole, he (his lordship) accepted the view that the attendance of a partner, for instance, at a lunch was an essential part of the transaction. Obviously, if the partner had to attend and the client had to be given lunch, business could not be promoted if the partner should sit by, eating and drinking nothing. The mere circumstance that the partner got a degree of gratuitous sustenance could not, in his (his lordship's) judgment, be a sufficient reason for holding that the transaction, from every other point of view a business transaction, lacked that characteristic. There was no evidence to support the finding of the commissioners, and the appeal would be allowed, with costs.

APPEARANCES: *J. Millard Tucker*, K.C., and *John Clements* (*Bentleys, Stokes & Lowless*); *Sir Frank Soskice*, K.C. (A.-G.) and *R. P. Hills* (*Solicitor of Inland Revenue*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

KING'S BENCH DIVISION

LEGAL AID: ANTE-DATED CERTIFICATE

Lacey *v.* Silk & Son, Ltd.

Slade, J. 11th May, 1951

Question of costs arising on a judgment given by Slade, J.

Judgment having been given for the defendants in an action by the plaintiff for damages for negligence and breach of statutory duty, it emerged that a legal aid certificate had been issued to the plaintiff on 13th January, 1951, that was, after the beginning of the trial. His solicitors caused the local committee to issue on 17th January, 1951, another certificate ante-dated 15th December, 1950. The question at issue accordingly was whether that procedure affected the plaintiff's liability to pay the defendants' costs.

SLADE, J., considered regs. 1 (*b*), 2 (1) (*c*), 5, 10 and 13 of the Legal Aid (General) Regulations, 1950, and reg. 2 (2), which provides that "any document purporting to be a certificate issued in accordance with these regulations shall, until the contrary is proved, be deemed to be a valid certificate issued to the person named therein," and said that, in his opinion, on the agreed facts and dates, "the contrary" had been proved, and the certificate issued on 17th January, 1951, was not issued in accordance with the regulations and so was not valid, because it bore a date ante-dating it by more than a month before the date on which it was in fact issued. The order of costs must be framed on that basis. Order accordingly.

APPEARANCES: *R. C. Chope* (*G. Houghton & Son*); *N. G. L. Richards* (*E. P. Rugg & Co.*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

PROBATE, DIVORCE AND ADMIRALTY DIVISION

DIVISIONAL COURT

DIVORCE: APPLICATION FOR REHEARING

Taylor *v.* Taylor

Lord Merriman, P., and Willmer, J.
4th May, 1951

Application for rehearing of a divorce petition.

The respondent husband was granted a decree *nisi* for desertion. The wife had entered no appearance to the petition according to the rules, but on the day of the hearing she applied by counsel for an adjournment to enable an answer to be filed. The divorce commissioner decided to hear the petition, saying that he could not in the circumstances imagine that that would do the wife any injustice. She now applied to the Divisional Court under r. 36 of the Matrimonial Causes Rules, 1950, for rehearing of her petition.

LORD MERRIMAN, P., said that in *Winter* v. *Winter* [1942] P. 151 there had been no appearance by the respondent, who had stood by. In *Prince* v. *Prince* [1951] P. 71; 94 SOL. J. 533, Evershed, M.R., had observed at p. 78, with regard to *Winter* v. *Winter*, *supra*, that as the husband had not entered an appearance it seemed doubtful whether he would have had any *locus standi* on appeal. Evershed, M.R., was referring to an appeal on the merits, not against a refusal at the hearing to grant an adjournment in order that the merits might be heard. In *Winter* v. *Winter*, *supra*, the respondent had not been before the court at all when the decree *nisi* had been pronounced; it was only afterwards that he had come forward; and it was absolutely essential to keep plainly in mind the distinction between an appeal on the merits, when there had been no appearance, and an appeal against the refusal of an application such as the present. The question was whether this was a case in which the conclusion of the judge at the trial or hearing in the court below was open to challenge according to the ordinary general procedure of the Court of Appeal. The answer to that would be "No" if the respondent had not taken, or attempted to take, any part in the hearing, and had stood by until the decree was pronounced. Then, according to *Winter* v. *Winter*, *supra*, it would have been right for the wife here to come to this court. The answer, in his opinion, was "Yes," if she went to the hearing, made a perfectly clear and intelligible application for an adjournment, and it were asserted that the commissioner had wrongly refused to entertain it. He (his lordship) was satisfied that they would be merely stultifying themselves and adding to such difficulties as had already arisen in connection with r. 36 if they were to do otherwise than to say that the remedy here was to go to the Court of Appeal.

WILLMER, J., agreed. Application refused.

APPEARANCES: *E. J. Parris* (*Russell Jones & Walker*, for *Pearlman & Rosen*, Hull); *Dennis Lloyd* (*Smith & Hudson*, for *Payne & Payne*, Hull).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

DIVISIONAL COURT

HUSBAND AND WIFE: CONDONATION

Viney *v.* Viney

Lord Merriman, P., and Havers, J.
24th May, 1951

Appeal from the metropolitan magistrate sitting at Tower Bridge magistrates' court.

The appellant wife, having committed adultery, returned to her husband's home because she was destitute and had nowhere else to go. The magistrate dismissed a subsequent application by her for a maintenance order on the ground of desertion, basing himself on the wife's neglectful and unwifely conduct after her return, and holding that that conduct had defeated the husband's attempt to effect a reconciliation, in the course of which he had sexual intercourse with her. The wife appealed.

LORD MERRIMAN, P., said that the magistrate's decision could only be supported by upholding *Whitney* v. *Whitney* [1951] P. 250. That case turned upon an incorrect interpretation of *Bartram* v. *Bartram* [1950] P. 1; 93 SOL. J. 552, and it was essential to remember, in considering *Bartram* v. *Bartram*, *supra*, that the element of sexual intercourse was there completely absent. Here it was present, and *Henderson* v. *Henderson* [1944] A.C. 49 decided that that was absolutely conclusive of the fact that the husband had thereby reinstated the appellant as his wife. It was quite impossible to hold, in relation to a long period during which, at intervals, the husband had voluntarily had sexual intercourse with his wife with the express object of effecting a reconciliation, that in fact there had been no reinstatement of her at all, and that her desertion was running continuously throughout the period; or that an alternation of condonation and revival after each act of sexual intercourse led to the same conclusion.

HAVERS, J., agreed. Appeal allowed.

APPEARANCES: *G. E. Empson* (*Hepburns*, Peckham); *P. R. Hollins* (*Hawker & Wheatley*).

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

COURT OF CRIMINAL APPEAL

RECEIVING: RECENT POSSESSION OF STOLEN PROPERTY

R. *v.* Loughlin

[PRACTICE NOTE]

Lord Goddard, C.J., Lynskey and Devlin, JJ. 4th June, 1951

An indictment was preferred containing one count of housebreaking and stealing property and another of receiving the stolen property. The deputy chairman of quarter sessions directed the jury that, because there was no evidence against the prisoner on the first count except his recent possession of the stolen property, they should not give a verdict on that count but should concentrate on the charge of receiving.

LORD GODDARD, C.J., in delivering the judgment of the court dismissing the prisoner's application for leave to appeal, said that it was too often the case, where a man was charged with housebreaking and the evidence against him was that soon after the breaking and entering he was in possession of the property, that courts advised juries that there was no evidence that he broke and entered and that they should concentrate on the charge of receiving. That was not the law: if, very shortly after premises had been broken and entered and property stolen from them, a man were found to be in possession of that property, that was certainly evidence from which the jury could infer that he was the housebreaker; and if he was it was really inconsistent to find him guilty of receiving, for a man could not receive from himself. That, however, was very often done. It was perfectly good evidence that the man was the housebreaker that he was found in possession of property stolen from a house quite soon afterwards. He (his lordship) hoped that courts would not think it necessary, although the only evidence against a man was that he was found in possession of property which had recently been stolen from a house that had recently been broken into, to charge a jury that that was not evidence on which they could find a verdict on the charge of housebreaking.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

SURVEY OF THE WEEK

ROYAL ASSENT

The following Bills received the Royal Assent on 1st August :—
Abingdon Corporation
Appropriation
Bournemouth and District Water
Brighton Extension
Bristol Corporation
British Transport Commission
British Transport Commission Order Confirmation
Consolidated Fund (Civil List Provisions)
Courts-Martial (Appeals)
Dangerous Drugs
Dartmouth Harbour
Faversham Navigation
Festival of Britain (Additional Loans)
Finance
Fireworks
Forestry
Great Yarmouth Port and Haven
Guardianship and Maintenance of Infants
Isle of Man (Customs)
Lancashire County Council (General Powers)
Liverpool Extension
London County Council (Crystal Palace)
London County Council (General Powers)
Midwives
Midwives (Scotland)
Mineral Workings
National Assistance (Amendment)
Nottingham City and County Boundaries
Nottinghamshire County Council
Nurses (Scotland)
Pier and Harbour Order (Lymington) Confirmation
Price Control and Other Orders (Indemnity)
Rag Flock and Other Filling Materials
Reserve and Auxiliary Forces (Protection of Civil Interests)
Rivers (Prevention of Pollution)
Rivers (Prevention of Pollution) (Scotland)
Rural Water Supplies and Sewerage
Saint Benet Gracechurch
Sir William Turner's Hospital at Kirkleatham Charity Scheme Confirmation
Slaughter of Animals (Amendment)
Sunderland Corporation
Sutton and Cheam Corporation
Swindon Corporation
Telephone
Tithe
Trent River Board
Walsall Corporation (Trolley Vehicles) Order Confirmation
West Riding County Council (General Powers)
Worcester Corporation

HOUSE OF LORDS

Questions

The Earl of Listowel stated that the Government hoped to introduce a Bill early next Session to amend the law relating to industrial and provident societies, which would include agricultural provident societies. [30th July.

HOUSE OF COMMONS

A. Debates

On the Committee Stage of the **Guardianship and Maintenance of Infants Bill,** Mr. Geoffrey de Freitas said it had been found impossible to amend the Bill to deal with the possibility of abuse by an applicant going to more than one court. The reasons were, first, that the law already enabled a court of summary jurisdiction to turn down an application on the ground that a previous application had been refused and that no fresh circumstances had arisen. Secondly, it had been found useless to set up a central register of applications for maintenance so that every clerk would know what application had been made, because the application must be heard before it could be determined whether or not there were any fresh facts. Mr. Osbert Peake thought circumstances in relation to the guardianship of a child might change so frequently that it would be wrong to place any limitation upon the number of applications which might be made in regard to it.

Mr. Gerald Williams said he understood that the maximum weekly sum which could be ordered for the maintenance of an illegitimate child was 20s. as against 30s. mentioned in the Bill. He thought this quite wrong, if it was so, and asked for an assurance that the word "child" in the Bill included "illegitimate child." In reply, Mr. Geoffrey de Freitas said the Bill was limited to two small and non-controversial points. One had to do with reversing the effect of a certain decision of Sandbach magistrates; the other had to do with removing one anomaly. The Bill did not remove any other anomalies in our law, or any distinctions between legitimate and illegitimate children. He could say, however, that if changes in the whole law relating to this matter were made, then the point made by Mr. Williams would be borne in mind.

A new clause was proposed, to replace that which had to be left out in the House of Lords on account of the Commons' privilege, extending s. 25 of the Finance Act, 1944, to cover payments made up to the child's twenty-first birthday and to cover 30s. instead of £1 as at present. Mr. Redmayne said cl. 2 (2) of the Bill extended maintenance up to twenty-one for a child engaged in education or training, but s. 25 of the Finance Act did not relate to *training* as opposed to *education*. Under the various Finance Acts which dealt with income tax there was an anomaly between children over the age of sixteen who were being educated and for whom a child allowance was made, and children over the age of sixteen who were being trained for a trade, for whom a child allowance was only made if their earnings did not exceed the old-fashioned figure of £13 a year. An effort had been made this year to remedy that anomaly but without success. He wanted to know whether in this Bill they were consenting again to the same anomaly. Mr. de Freitas said he could only say that the Bill did not alter the law except as he had stated, but he felt that Mr. Redmayne's construction of the law as it stood might well be wrong. [27th July.

B. Questions

Channel Islands (Convicted Persons)

Mr. Chuter Ede stated that prisons in the Channel Islands were unsuitable by modern standards for detention for long periods. In appropriate cases therefore, at the request of the Channel Island authorities, he authorised the transfer of prisoners to England under the provisions of s. 61 (2) of the Criminal Justice Act, 1948. Transfers were normally confined to persons sentenced to imprisonment for twelve months or longer or to Borstal training. [27th July.

Girls under Sixteen (Marriage Ceremony)

The Solicitor-General said he was aware of cases in which women had gone through the ceremony of marriage and had children and had later been declared unmarried on the grounds that they were under sixteen at the time of the ceremony. The Lord Chancellor proposed to ask the Royal Commission on Marriage and Divorce to consider whether any amendment should be made to the law in view of these cases. [31st July.

Development Charge (Interest)

Mr. Dalton said he was aware that a rate of interest of 4½ per cent. was charged by the Central Land Board upon outstanding instalments of development charge in cases where the developing owner was not able to meet the whole of the charge before development commenced. The reason for this high rate of interest was that the security was only a second mortgage. [1st August.

STATUTORY INSTRUMENTS

Agriculture Act (Part I) Extension of Period Order, 1951. (S.I. 1951 No. 1342.)
Bacon (Rationing) (Amendment No. 2) Order, 1951. (S.I. 1951 No. 1328.)
Civil Defence (Public Protection) (Warnings) Regulations. (S.I. 1951 No. 1351.)
County Court (Amendment) Rules, 1951. (S.I. 1951 No. 1354 (L.7).)
County of the Isle of Wight (Electoral Divisions) (No. 2) Order, 1951. (S.I. 1951 No. 1347.)
County of West Lothian Water Order, 1951. (S.I. 1951 No. 1330 (S.67).)
Export of Goods (Control) Order, 1951 (Amendment No. 2) Order, 1951. (S.I. 1951 No. 1353.)

Iron and Steel Scrap (No. 3) Order, 1951. (S.I. 1951 No. 1359.)
Iron and Steel Utilization (Information) Order, 1951. (S.I. 1951 No. 1345.)
Land Registration (Conduct of Public Enquiries) Rules, 1951. (S.I. 1951 No. 1334.)
Lincoln Corporation Water Order, 1951. (S.I. 1951 No. 1346.)
London Cab (No. 2) Order, 1951. (S.I. 1951 No. 1352.)
London Traffic (Prescribed Routes) (No. 16) Regulations, 1951. (S.I. 1951 No. 1337.)
Milk (Special Designations) (Specified Areas) Order, 1951. (S.I. 1951 No. 1358.)
National Insurance (Claims and Payments) Amendment Regulations, 1951. (S.I. 1951 No. 1332.)
Nurses (Regional Nurse-Training Committees) (Scotland) Order, 1951. (S.I. 1951 No. 1331 (S.68).)
Perambulator and Invalid Carriage Wages Council (Great Britain) Wages Regulation Order, 1951. (S.I. 1951 No. 1329.)
Prison Rules, 1951. (S.I. 1951 No. 1343.)
Railway Police Conferences (Appointed Day) Order, 1951. (S.I. 1951 No. 1356.)
Solicitors (Scotland) Act, 1949 (Appointed Day) (No. 2) Order, 1951. (S.I. 1951 No. 1348 (C.6) (S.70).)
Superannuation (Teaching and Health Education) (Scotland) Rules, 1951. (S.I. 1951 No. 1355 (S.71).)
Teachers (Special Recruitment) (Scotland) Provisional Regulations, 1951. (S.I. 1951 No. 1341 (S.69).)
Thames Conservancy (Appointment of Conservators) Regulations, 1951. (S.I. 1951 No. 1322.)
Utility Apparel (Nurses' Uniforms) (Manufacture and Supply) (Amendment No. 2) Order, 1951. (S.I. 1951 No. 1339.)
Utility Apparel (Oilskins) (Amendment No. 2) Order, 1951. (S.I. 1951 No. 1338.)
Utility Apparel (Women's Domestic Overalls and Aprons) (Manufacture and Supply) (Amendment No. 2) Order, 1951. (S.I. 1951 No. 1340.)
Utility Cloth and Utility Household Textiles (Maximum Prices) Order, 1951. (S.I. 1951 No. 1324.)
Utility Footwear (Supply, Marking and Manufacturers' Prices) (Amendment) Order, 1951. (S.I. 1951 No. 1350.)
Ware Potatoes Order, 1951. (S.I. 1951 No. 1349.)
Wild Birds Protection (Plymouth) Order, 1951. (S.I. 1951 No. 1333.)

REVIEW

Stone's Justices' Manual. Eighty-third Edition. Edited in two volumes by JAMES WHITESIDE, Solicitor, Clerk to the Justices for the City and the County of the City of Exeter. 1951. London: Butterworth & Co. (Publishers), Ltd. 72s. 6d. net.

The preface to the 1951 edition of Stone indicates that over 100 new decisions have been noted in the text and the gist of the more important of these is set out, as well as that of statutes recently passed. Where it has not been possible to include new statutes in the appropriate place in the text, they have been noted in the preface, and everyone who wishes to keep abreast of the changes in the law which have taken place since the eighty-second edition should read the preface with care.

It can be said at once of the new edition that it appears to be as accurate and as valuable a text-book as its predecessors and that the editor has included all the new matter needing to be included. The book continues to be indispensable to any solicitor practising in magistrates' courts, and Mr. Whiteside continues to deserve the tribute paid to the editors of Stone in *Moore* v. *Hewitt* [1947] K.B. 831.

Having joined in the chorus of praise with which each new edition is deservedly greeted, we feel that there are some things which must be said about the book in general. Were there already in existence a book dealing with summary jurisdiction comparable in arrangement and lucidity to Megarry or Paterson (of which Mr. Whiteside was once editor) and Stone were to appear to-day for the first time, we believe that reviewers, red in tooth and claw, would fasten on it without mercy and rend the editor for its arrangement, its bulk, its selection of contents and its print. The memory of the man in the reviewer's chair runneth not to the time when Stone first appeared; no doubt it was then a lucid and well-ordered text-book. But it has grown and may be compared now to a once-elegant house to which wings, annexes and other structures, temporary and otherwise, have been added by different hands from those of the original architect, so that the first design is obscured and overwhelmed. (Or, for those to whom non-architectural similes appeal, it may be compared to a once-beautiful and sylph-like and still indispensable secretary who has put on weight in the wrong places, properly so-called.) Its arrangement could, we suggest, be improved: e.g., some of the material which appears in Pt. IV relating to Practice has already appeared earlier, and several of the statutes which are to be found among the regulations could properly be put elsewhere. Again, the portion relating to husband and wife is difficult to follow—the text sometimes disappears completely among the notes and it is not easy to ascertain what orders can be made or what the statutory provisions as to adultery are. The notes are undoubtedly comprehensive and accurate, and we are sure that all the law from every source on this subject is to be found in this section, would men observingly distil it out.

Nevertheless, we do suggest with respect that the whole of this section is in need of rearrangement and rewriting, especially having regard to the importance of the subject in magistrates' courts.

As to the bulk and contents of Stone, we commend to the editors the suggestion that a great deal of the matter now in Stone could be removed without affecting the value of the book at all. A perusal of the book shows that it deals at some length with such diverse subjects as clergy discipline, agricultural marketing, the Wheat Acts and the Cancer Act, census, checkweighing, grey seals, marine insurance and gambling policies therein, therapeutic substances, threshing machines and the international circulation of motor vehicles, while the index proves that salvarsan, grogging, forging the Great Seal and sending vitriol by rail are also mentioned in the text. Among the many statisticians employed by the Home Office there is doubtless one who collects information as to the offences dealt with annually by magistrates' courts; a reference to these statistics would surely show what subjects could safely be omitted from future editions. If it is replied that Stone seeks to include all matters relating to summary jurisdiction, we say that it does not now succeed in so doing—the important Acts relating to the policing of the Metropolis are not mentioned nor are many regulations affecting food and national insurance, the Public Stores Act (often used by some police forces) is quite inadequately treated, and the effect of many provisions of the Companies Act is only summarised. We do not blame the editor for these acts of omission, but rather account them to him for righteousness, and our only complaint is that more has not been omitted. The "Appendix of Table of Punishments" may be useful to some readers, but it would, we suggest, be improved by a little pruning, e.g., of such little-met offences as appear under "crabs," "lobsters," and "pound-breach." When the Justices of the Peace Act, 1949, s. 27 (diverting the stream of fines wholly into the Exchequer), comes into force, no doubt the editors will consider whether or not this table will any longer justify its inclusion in Stone as most of the information in it is readily obtainable elsewhere in the book.

One sometimes hears complaints as to the index of Stone, but we consider that it is now a well-indexed book. We do, however, suggest that headings which could usefully be added are "Amendment of summons," "Halt signs," "Slow signs," the verbs "Drive," "Use" and "Permit," and "White lines" (the last would conveniently fit between "White Fish Commission" and "White slave trade"). Other improvements which we would like to see in Stone (remembering that it is,

after all, a justices' manual as well as a legal text-book) are the inclusion of short accounts of civil debt procedure, of the duties of magistrates under the Lunacy and Mental Deficiency Acts and of the procedure where witnesses are ill (but not dangerously ill). At present, the reader must seek out the law on these subjects from the text of various statutes, not an easy task for a layman. Also, the subject of the powers and duties of magistrates as to sureties of the peace should, in our view, and having regard to the lack of appeal against orders to find sureties for good behaviour, be treated more fully and comprehensively than it now is.

It is conceded that effecting the changes advocated above would entail a good deal of work and trouble for the editors, assuming they agreed with them. An additional difficulty is that a Bill to consolidate the law relating to magistrates' courts is expected shortly; when this modern Tribonian has completed his task, no doubt there will soon follow a Bill to amend the consolidation and, in the way these things go, then will come yet another Bill to consolidate the consolidation, as amended. To attempt to re-cast the form of Stone and to rewrite some of its pages when the foundation statutes relating to magistrates' courts are changing is likely to be a formidable, perhaps an impossible, task. Certainly the task of keeping Stone, in its present form, up to date and of producing a new edition each year is one that must fully engage busy magistrates' clerks like Mr. Whiteside and his colleague, and we doubt if the revision of Stone which we have suggested above could, in fact, be carried out by them or by any other pair of editors, if a new edition must appear every twelve months.

It may be that one way out of the difficulty would be to appoint a board of editors, after the fashion of the last edition of Dicey's "Conflict of Laws," who could work on revision while the present editors engaged themselves mainly in the day-to-day tasks of keeping the book up to date and preparing the next edition. Alternatively, since no two men could be found better qualified for their task than the two present editors, we would suggest that supplements be issued from time to time instead of a regular yearly edition of the whole work. In view of the great importance of magistrates' courts in the administration of justice in this country and the statutory recognition of the need to instruct magistrates in their duties, we feel that perhaps the Government itself should intervene to make Stone an acceptable book to lay justices (and, incidentally, police officers), as well as to lawyers—not, of course, by nationalising the present editors but by bearing the cost to the publishers of appointing some eminent summary jurisconsult to devote himself full-time to recasting Stone while the present editors continue their able work of producing new editions. However, whether there are objections to this course or not, we are quite sure that the Treasury would think of some.

We do not like to attack an old and valuable friend like Stone, and we have tried to make our criticism constructive. Certainly none can be levelled at the present editor, to whom the words "*damnosa hereditas*" may perhaps have occurred when he first took up his duties. Stone is an indispensable book and a good one; we ask only that it should be made an even better one.

We think the following summary of the decision in *Wells* v. *Sidery* (83 SOL. J. 891) deserves to be rescued from the obscurity of a footnote on p. 2070: "'Work' does not include activities such as watching other men at work, etc."

NOTES AND NEWS

Personal Notes

Mr. A. W. Moore, solicitor, of Coventry, was married on 24th July to Miss Sheila Margaret Haddon, of Coventry.

Miscellaneous

SOLICITORS' REMUNERATION IN NON-CONTENTIOUS BUSINESS

With a view to the summoning of the committee constituted under s. 56 of the Solicitors Act, 1932, the Lord Chancellor has nominated Mr. J. W. T. Holland, President of the Incorporated Law Society of Liverpool, to serve as a member of that committee.

CIVIL LIABILITY FOR DAMAGE BY ANIMALS

The Lord Chancellor has appointed the following to be a committee to consider the law of civil liability for damage done by animals and to make recommendations:—the Lord Chief Justice of England, Lord Tucker, Mr. Justice Devlin, Professor A. L. Goodhart, K.B.E., K.C., Mr. John G. Archibald, Mr. N. Croom-Johnson, Mr. Arthian Davies, K.C., and Mr. Rodger Winn, and has appointed Mr. R. J. Parker to be secretary, and Mr. K. M. Newman to be assistant secretary, of the committee.

Communications for the committee may be addressed to Mr. K. M. Newman at the Lord Chancellor's Office, House of Lords.

WEST RIDING OF YORKSHIRE DEVELOPMENT PLAN

The above development plan was on 25th July, 1951, submitted to the Minister of Local Government and Planning for approval. It relates to land situate within the administrative area of the West Riding of Yorkshire and comprises land within each non-county borough, urban district and rural district within that area. A certified copy of the plan as submitted for approval may be inspected free of charge from 9 a.m. to 5 p.m. (Saturday 9 a.m. to 12 noon) at the County Planning Office, 7 Bond Street, Wakefield, and at each of the Area Planning Offices in the county, the addresses of the latter being as follows:—

(*a*) Yorkshire Penny Bank Chambers, High Street, Skipton.
(*b*) Salisbury Buildings, Albert Street, Harrogate.
(*c*) Standard Buildings, Half Moon Street, Huddersfield.
(*d*) 22 Market Place, Pontefract.
(*e*) Old Chronicle Buildings, Peel Square, Barnsley.
(*f*) Old Exchange, Cleveland Street, Doncaster.

Certified extracts of the plan so far as it relates to each non-county borough, urban district and rural district in the administrative area may be inspected free of charge at the above times at the offices of those authorities.

Any objection or representation with reference to the plan may be sent in writing to the Secretary, Ministry of Local Government and Planning, Whitehall, London, S.W.1, before 24th September, 1951, and should state the grounds on which it is made. Persons making an objection or representation may register their names and addresses with the County Council of the West Riding of Yorkshire by letter addressed to the Clerk of the County Council of the West Riding of Yorkshire, County Hall, Wakefield, and will then be entitled to receive notice of the eventual approval of the plan.

CONTROL OF MIGRATION OF COMPANIES AND SHAREHOLDINGS

The conditions under which Treasury consent is necessary for the emigration of companies resident in the United Kingdom and for certain allied transactions, under the restrictive provisions of s. 36 of the Finance Act, 1951, which recently received the Royal Assent, have been defined by the Treasury and were announced by the Chancellor of the Exchequer in Parliament in a written answer on the 2nd August, 1951.

The section makes it unlawful, without the Treasury's consent, for a company resident in the United Kingdom (i.e., if the central management and control of its trade or business is exercised in the United Kingdom)—

(*a*) to cease to be so resident;
(*b*) for the trade or business or any part of it to be transferred to a person not resident in the United Kingdom;
(*c*) to cause or permit an overseas subsidiary company to create or issue any shares or debentures;
(*d*) except for the purpose of a director's qualification, to transfer, or to cause or permit to be transferred, any shares or debentures which it owns (or in which it has an interest) in an overseas subsidiary company.

A company whose functions consist wholly or mainly in the holding of investments or other property is included within the scope of the section. "Control," in the sense in which one company is to be regarded as a subsidiary of another and therefore "controlled" by that other, is defined as meaning the power enjoyed by that other company through the ownership of shares or otherwise to ensure that its wishes can determine the way in which the affairs of the first company are conducted.

Notes issued by the Treasury on 2nd August state that the section was included in the Finance Bill with the object of controlling certain types of activity leading to loss of tax. The tax advantage to be derived from transferring the management and control of the whole business abroad or transferring the business to a person resident abroad is that United Kingdom income tax and profits tax cease to be chargeable in respect of the profits arising abroad, except to the extent that they are remitted to this country as dividends; income tax is chargeable on such dividends and profits tax is chargeable if they are received by a United Kingdom company.

Further, it is stated, a company which is resident in the United Kingdom for tax purposes is chargeable to income tax and profits tax on dividends that it receives from a subsidiary company which is not resident in the United Kingdom. Experience has shown that it is possible for United Kingdom companies to arrange by various devices, for example, through a bonus issue of shares by the subsidiary followed by a subsequent repayment of capital, that the income formerly received in the form of dividends comes to the United Kingdom company in capital, non-taxable, form. Similarly, it is possible for a United Kingdom company to arrange for the transfer of its shareholding in an overseas subsidiary to another overseas subsidiary, even perhaps specially created for the purpose, which in turn is able to adopt a device of bonus issue and repayment, or indeed one of a number of alternatives that will achieve a similar objective.

A mere transfer of assets not resulting in a substantial change in the character or extent of the business is not affected by the section. Moreover, the Treasury are giving consent generally, in accordance with subs. (4) (*a*) of s. 36 to the following classes of transaction:—

(1) Transactions falling within paras. (*a*) and (*b*) of subs. (1) where—

(*a*) the body corporate resident in the United Kingdom is incorporated after the passing of the Act for the purpose of carrying on a new trade or business not theretofore carried on by any person; and

(*b*) more than 50 per cent. of the issued share capital of that body corporate in existence at the time of the transactions in question, or, if there is then in existence issued share capital of the body corporate of more than one class, more than 50 per cent. of the issued share capital thereof of each class, is then, and was when it was issued, in the beneficial ownership of persons not ordinarily resident in the United Kingdom.

(2) A transaction falling within para. (*c*) of subs. (1) which consists of the issue, by a body corporate not resident in the United Kingdom over which a body corporate resident in the United Kingdom has control, of shares for full consideration paid in cash to the body corporate issuing the shares or in or towards payment for any business, undertaking or property acquired for full consideration, unless either—

(*a*) the shares are redeemable preference shares; or

(*b*) the shares are issued to, or to trustees for, a body corporate not resident in the United Kingdom over which the body corporate resident in the United Kingdom has control, or to, or to trustees for, an individual or individuals who has or have control over the last-mentioned body corporate; or

(*c*) the effect of the transaction is that the last-mentioned body corporate will no longer have control over the body corporate not resident in the United Kingdom.

(3) A transaction falling within para. (*d*) of subs. (1) which consists of the transfer of shares to a body corporate resident in the United Kingdom, unless the effect of the transaction is that the body corporate resident in the United Kingdom which transfers the shares or causes or permits the shares to be transferred will no longer have control over the body corporate not resident in the United Kingdom.

Unless and until the general consent for these classes of transaction is revoked, individual applications to the Treasury for transactions of the kind covered will not be required. Individual applications will be necessary for transactions which are excluded by the exceptions specified in respect of each class.

An Advisory Committee (Lord Kennet (chairman), Sir Kenneth Swan, K.C., and Mr. B. A. Binder) will assist the Chancellor in reaching decisions in individual cases. The proposed procedure is that companies will, with the aid of an application form, present their case to the Treasury. If the case is straightforward, and the Treasury has no objection, consent will be notified. In other cases the facts and circumstances, including the company's application, will be reported to the Advisory Committee for its advice. In the light of that advice the final decision will be taken.

The terms of reference of the Advisory Committee are:—

"They will take into account the significance of any new factors or circumstances which are represented to require the proposed change, and any compelling reasons for such applications based on the efficiency and development of the applicant's operations. The committee will weigh against considerations of this kind the prospective loss of revenue or of foreign exchange to this country which the transaction, if permitted, would entail; and they will inform the Chancellor whether, on a balance of considerations, it would, in their opinion, be in the national interest that permission should be granted."

CASES REPORTED IN VOL. 95

7th July to 11th August, 1951

For list of cases reported up to and including 30th June, see Interim Index

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